

ESTTA Tracking number: **ESTTA334102**

Filing date: **02/25/2010**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92051361
Party	Plaintiff United Home Care Services, Inc
Correspondence Address	Michael Tschupp Espinosa Trueba PL 3001 SW 3rd Ave Miami, FL 33129 UNITED STATES trademark@etlaw.com
Submission	Motion to Amend Pleading/Amended Pleading
Filer's Name	Michael E. Tschupp
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Signature	/Michael Tschupp/
Date	02/25/2010
Attachments	Microsoft Word - motion to file amended petition.pdf (3 pages)(22624 bytes) Microsoft Word - united homecare cancellation - AMENDED.pdf (5 pages (33864 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In re Reg. No. 3180437
Mark: UNITED HOME CARE

Registration Date: December 5, 2006

United Home Care Services, Inc

Cancellation No. 92051361

Petitioner,

v.

United Home Care, Inc.,

Registrant.

CONSENT MOTION TO FILE AMENDED PETITION FOR CANCELLATION

Petitioner, United Home Care Services, Inc., (hereinafter “Petitioner” or “United HomeCare”), by and through undersigned counsel, and pursuant to Fed. R. Civ. P. 15(a), 37 CFR §2.115, and TBMP §507, hereby requests that its Amended Petition for Cancellation, attached hereto, be accepted as file in this proceeding, and states as follows:

1. This proceeding was instituted by Petitioner’s filing of a Petition for Cancellation (the “Petition”) on August 19, 2009.
2. One of Petitioner’s asserted grounds for the cancellation of Registrant’s registration is Registrant’s alleged fraud on the PTO in procuring the registration.
3. After the filing of the Petition, the United States Court of Appeals for the Federal Circuit provided new guidance on the pleading standards for fraud on the PTO in *In re Bose Corporation*, 91 USPQ2d 1938 (Fed. Cir. August 31, 2009). The purpose of the proposed amendment is to conform the Petition’s count for fraud on the PTO to this guidance.

4. Discovery is ongoing in this proceeding and the proposed amendment does not raise new matters requiring additional discovery. Accordingly, the proposed amendment is timely and Registrant would not be prejudiced by acceptance of the amended Petition.

5. Through e-mail from its counsel, Registrant has provided written consent for Petitioner to file an Amended Petition for Cancellation.

WHEREFORE, Petitioner respectfully requests that the Amended Petition for Cancellation being submitted herewith be accepted as filed.

Respectfully submitted,

ESPINOSA | TRUEBA PL
Attorneys for Petitioner
3001 SW 3rd Avenue
Miami, Florida 33129
Telephone: (305) 854-9000
Facsimile: (305) 285-5555

Dated: February 25, 2010

By: /s/ Michael Tschupp
Jorge Espinosa
Michael Tschupp (Reg. No. 55,895)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing is being served by delivering a true and correct copy of same via First Class Mail delivery to Registrant, United Home Care, Inc., at of 409 East Doyle Street, Toccoa, GA 30577 and counsel for Registrant J. Tucker Barr, Esq., Arnall Golden Gregory LLP, 171 17th Street NW, Suite 2100, Atlanta GA 30363 on this 25th day of February, 2010.

/s/ Michael Tschupp
Michael Tschupp

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In re Reg. No. 3180437
Mark: UNITED HOME CARE

Registration Date: December 5, 2006

**AMENDED PETITION FOR
CANCELLATION**

United Home Care Services, Inc

Petitioner,

Cancellation No. 92051361

v.

United Home Care, Inc.,

Registrant.

Petitioner, United Home Care Services, Inc., (hereinafter “Petitioner” or “United HomeCare”) believes that it is or will be damaged by Registrant, United Home Care’s (hereinafter “Registrant” or “UHC”), Registration No. 3,180,437 (hereinafter “Challenged Registration”) and, accordingly, petitions the Board to cancel such registration, in whole or in part, pursuant to 15 U.S.C. § 1064.

Introduction

1. The Registration should be canceled and restricted because the mark claimed in the Challenged Registration is confusingly similar to Petitioner’s mark “UNITED HOME CARE”, which has priority of use.

Parties

2. Petitioner is a company organized and existing under the laws of the State of Florida and has its principal place of business located at 5255 NW 87th Ave, Suite 400, Miami FL 33178.

3. Upon information and belief, Registrant is a corporation organized and existing under the laws of the State of Georgia and has a mailing address of 409 East Doyle Street, Toccoa, GA 30577.

Standing

4. On or about as early as 1974, Petitioner commenced using the trademark “UNITED HOME CARE” in commerce in connection with home health care services.

5. On December 9, 2005, Registrant applied to register the mark “UNITED HOME CARE” on the principal register of the United States Patent and Trademark Office (“USPTO”), Serial No.: 78/770431 (the “Application”). The Application identified services as follows:

Home healthcare services.

6. In the Application, Registrant claimed a date of first use of April 12, 1999.

7. Petitioner began using the identical trademark in commerce for similar or identical services at least as early as 1974.

8. Petitioner discovered the Challenged Registration in late 2008 or early 2009, while preparing to file for registration of its mark.

9. As a result of the foregoing, Petitioner has been damaged or will be damaged by Registrant’s Registration No. 3,180,437.

The Harm to Petitioner

10. Unless the Challenged Registration is canceled, Petitioner will be damaged because Registrant will have presumptive exclusive rights to the mark “UNITED HOME CARE”, which is identical and therefore *per se* confusingly similar to Petitioner’s Mark for the same class of services. Petitioner will be further damaged because the USPTO will likely refuse registration of Petitioner’s intended application.

Count I - Cancellation Based On Petitioner's Superior Rights

11. The Mark contained in Registrant's Challenged Registration is confusingly similar to Petitioner's Mark, which covers identical services.

12. Petitioner has superior rights by virtue of its prior use of the mark.

13. Registrant's use of its confusingly similar mark in connection with such services is likely to cause confusion, or to cause mistake, or to deceive.

14. Accordingly, the Challenged Registration should be canceled pursuant to 15 U.S.C. § 1052(d).

Count II -Cancellation Based On Registrant's Fraud Upon The USPTO

15. As required by 15 U.S.C. §§ 1051(a)(3)(B),(C), and (D), Registrant filed as part of the Application sworn statements that to the best of its knowledge and belief, the facts recited in the Application were accurate and that no other person, firm, corporation, or association had the right to use the subject mark, or any confusingly similar mark, in commerce.

16. These statements were false because, upon information and belief, Registrant did not commence its use of the mark contained in the Application until a date much later than the date asserted in the Application. The Registrant company incorporated on April 12, 1999, but, upon information and belief, would not have commenced transacting business in commerce until after that date.

17. These statements were also false because, as described above, Petitioner was a prior user of the mark and, upon information and belief, Registrant knew that this was the case.

18. The health care industry is a small one and most participants are aware of one another.

19. Respondents are based in Georgia, a neighboring state to Florida, Petitioner's state, and were likely to have been aware of Petitioner's business.

20. Furthermore, with widespread Internet use in the late 1990's and early 21st century, Registrant could not have failed to learn of Petitioner's prior use prior to filing its application for trademark registration.

21. These statements were material because if the USPTO had been aware that the Application inaccurately reflected the date of first use, or had been aware of Petitioner's prior use of an identical mark, it would not have granted the Challenged Registration.

22. Registrant therefore made false representations of material fact to the Trademark Office in the Application that resulted in the Challenged Registration.

23. Upon information and belief, Registrant knew these statements were false because it was aware of the true date of its first use in commerce of the subject Mark as well as Petitioner's prior use of its similar mark. Upon information and belief, these statements were made with the intent to deceive the PTO.

24. Accordingly, the Challenged Registration should be canceled.

WHEREFORE, Petitioner respectfully requests that Registration No. 3,180,437 be canceled, and that the Board grant such other relief deemed proper.

Respectfully submitted,

ESPINOSA | TRUEBA PL
Attorneys for Petitioner
3001 SW 3rd Avenue
Miami, Florida 33129
Telephone: (305) 854-9000
Facsimile: (305) 285-5555

Dated: February 25, 2010

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/s/ Michael Tschupp
Michael Tschupp